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**IN THE
COURT OF APPEALS OF INDIANA**

SYLVESTER ANDERSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 03A01-0709-CR-420

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0609-FD-1624

April 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Sylvester Anderson appeals the sentence imposed following his plea of guilty to check deception, as a class D felony.¹

We affirm.

ISSUE

Whether the trial court erred in sentencing Anderson.

FACTS

On July 24, 2006, Anderson purchased a truck from Weddle Auto Sales, located in Bartholomew County. Anderson wrote a check in the amount of \$8,356.00 as payment for the truck. At the time of the transaction, an employee of Weddle Auto Sales obtained a copy of Anderson's drivers license to verify his identity. Subsequently, Anderson's bank refused the check because his account had been closed since October of 2004.

On September 8, 2006, the State charged Anderson with check deception, as a class D felony.² Anderson initially entered a plea of not guilty. On June 19, 2007, Anderson requested that his plea be vacated, and he entered a plea of guilty as charged. The trial court ordered a pre-sentence investigation report ("PSI"), which showed that Anderson had been convicted of the following: 1) driving while suspended in 1990; 2) criminal mischief in 1991; 3) conversion in 1992; 4) auto theft in 1994; 5) receiving stolen property in 1994; 6) non-support of a dependent in 1999; and 7) conversion in

¹ Ind. Code § 35-43-5-5.

² Indiana Code section 35-43-5-5(a) provides that the offense of check deception is a class D felony "if the amount of the check, draft, or order is at least two thousand five hundred dollars (\$2,500) and the property acquired by the person was a motor vehicle."

2005. The PSI also indicated that Anderson had been arrested and charged with theft several times and had been arrested for check deception in the State of Michigan in 2006. Additionally, the PSI showed that Anderson's probation had been revoked in prior cases, with the most recent petition to revoke probation filed on January 12, 2006, and that Anderson had failed to appear on a theft charge in Jennings County and an escape charge in Jackson County. Anderson also had charges pending against him for forgery, auto theft and check deception in Brown County.

The trial court held a sentencing hearing on July 24, 2007. During the hearing, the following dialogue took place:

Q You wrote a check for eight thousand dollars. You didn't have any money in your account.

A Yes, sir.

Q You would like to go back and fix that. . . . [W]hat does that mean?

A I mean I wish it would have never happened.

Q Well, who decided to do that?

A Actually to be honest with you, Your Honor, me and my girlfriend at the time and I wasn't really thinkin' [sic] before I did it. We just knew we was needin' [sic] a vehicle.

Q Well, it wasn't the first time you stole something.

A No, sir.

* * *

Q [Y]ou stole a vehicle in nineteen ninety-one.

* * *

Q Was that an accident?

A Actually, sir, I rented the vehicle from Storey Ford.

* * *

Q You didn't return it.

A . . . didn't get it back on time.

* * *

Q . . . You are just so full of nonsense . . . I'm guessing this is what you tell people all the time. It was a mistake. I'm sorry. You don't own it. You're a thief. Right?

A Yeah, I've made some mistakes.

(Tr. 10-12). The trial court then issued the following statement:

You do not acknowledge anything. You say it's a mistake. You are a thief. . . . Writing an eight thousand dollar check to somebody and stealing their car is a felony. That is why they call it a felony and not a mistake. . . . This is your fourth felony conviction. You have holds out of Brown County, Jackson County, Jennings County, Lawrence County, and Bullet County, Kentucky.

* * *

You're just a thief. . . . You have a conviction for auto vehicle theft in ninety-one in Jackson County. Receiving stolen property in Jennings County in nineteen ninety-four. A theft in Lawrence County which is a . . . conversion. Apparently they're revoking your probation on that one or seek to. . . . And you [sic] got a charge pending out of Brown County for forgery and auto theft. It's not a mistake. It's not even close to being a mistake. A mistake is an accident. You did this on purpose. It's not a mistake. And when you come up here and tell me . . . I was gonna [sic] let you out. I mean I was gonna [sic] cut you a deal until you started giving me this mistake stuff. That's just a lie. That means there's hardly any chance you are ever going to change your behavior. So I was gonna [sic] give you an aggravated sentence because of your record with four misdemeanor convictions and four felony convictions now certainly

warrants an aggravated circumstance especially since you commit so many thefts and since you have some pending also.

(Tr. 13-15). The trial court sentenced Anderson to thirty months, with no time suspended.

DECISION

Anderson asserts that the trial court erred in sentencing him. Specifically, Anderson argues that the trial court failed to consider his guilty plea as a mitigating circumstance and that his sentence is inappropriate.

1. Guilty Plea

Anderson contends that the trial court abused its discretion by failing to identify his guilty plea as a mitigating circumstance. We disagree.

Sentences are within the trial court's discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the record does not support the reasons given for imposing the sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration. *Id.* at 490-91.

We have held that a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. But an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. And the significance of a guilty plea as a mitigating factor varies from case to case. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, . . . or when the defendant receives a substantial benefit in return for the plea.

Anglemyer, 875 N.E.2d at 220-21.

Regarding the acceptance of responsibility, “the record shows that the plea agreement was ‘more likely the result of pragmatism than acceptance of responsibility and remorse.’” *Id.* at 221 (quoting *Mull v. State*, 770 N.E.2d 308, 314 (Ind. 2002) (citations omitted)). This is so because the evidence against Anderson was overwhelming. *See Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) (“The plea may also be considered less significant if there was substantial admissible evidence of the defendant’s guilt.”).

Furthermore, although Anderson expressed remorse for his actions, he also attempted to minimize his culpability. Anderson stated that he “wasn’t really thinkin’ [sic],” but “just knew we was needin’ [sic] a vehicle.” (Tr. 10).

Anderson has not demonstrated that his guilty plea was a significant mitigating circumstance. We therefore conclude the trial court did not abuse its discretion by omitting reference to the plea when imposing sentence.

2. Inappropriate Sentence

Anderson asserts that his sentence of thirty months is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant’s burden to “‘persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.’” *Anglemyer*, 868 N.E.2d at 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime

committed.” *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class D felony is one and one-half years. I.C. § 35-50-2-7.³ The potential maximum sentence is thirty-six months. *Id.* Here, the trial court sentenced Anderson to thirty months.

Regarding the nature of the offense, the record discloses that Anderson wrote a check for more than eight thousand dollars on a long-closed account in exchange for a vehicle, which is missing. Regarding Anderson’s character, the record reflects that Anderson has several prior convictions, including convictions for theft, conversion, auto theft, and receiving stolen property. Moreover, Anderson has previously had his probation revoked. Accordingly, prior attempts to rehabilitate Anderson and deter him from future unlawful conduct have failed. Based on the above, we conclude that the sentence imposed by the trial court was not inappropriate.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.

³ Indiana’s new advisory sentencing scheme, which went into effect on April 25, 2005, applies in this case. Pursuant to Indiana Code section 35-50-2-7, “[a] person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years.”